

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
EDWARD A. COON,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-74

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the denial of an application for the appropriation of surface water, came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, Chris Smith and David Akana (presiding) at a formal hearing in Yakima on October 10, 1979.

Appellant was represented by his attorney, Patrick J. Morrissey; respondent was represented by Laura E. Eckert, Assistant Attorney General.

Having heard the testimony, having examined the exhibits, having considered the contentions of the parties and having considered the

1 exceptions filed by the appellant and respondent, the Board makes thes.

2 FINDINGS OF FACT

3 I

4 In February of 1974, appellant Edward Coon submitted Surface Water
5 Application No. S3-22567 to the respondent, Department of Ecology, for
6 the use of 0.4 cubic foot per second (cfs) from Nicholson Creek, a_
7 small intermittent tributary to Toroda Creek (a perennial stream) in
8 northern Okanogan County, Washington. Toroda Creek receives drainage
9 from over a 200 square mile relatively arid area.

10 II

11 Appellant owns property at the confluence of Nicholson and Toroda
12 Creeks. He sought to appropriate water for rill irrigation of 20
13 acres during the period April 15 to August 30 of each year. His
14 permit application was denied by the department because the proposed
15 use of water would be detrimental to the public interest. The denial
16 was appealed to this Board.

17 III

18 During consideration of appellant's application, the Department
19 discovered that Nicholson Creek was tributary to Toroda Creek, which
20 had been administratively closed to further appropriation of surface
21 water at the request of the Washington State Department of Game since
22 the early 1950's. Nicholson Creek supplies Toroda Creek through
23 surface flow (intermittent) and ground water flow (continuous). The
24 Department of Game considers, and evidence shows, that Toroda Creek is
25 an excellent spawning and fishing stream for rainbow, cut-throat and
26 Eastern brook trout.

IV

There are no minimum flows or base flows established by regulation for either Toroda or Nicholson Creek. The Department of Game suggested a minimum flow of 3 cfs "from the mouth of Toroda Creek upstream to the mouth of Nicholson Creek" in 1950. The Department of Game has since discredited this figure as too low because it was established as a stopgap measure and is not satisfactory, in its current judgment, to protect stream flows and the fish resource. During September 1979, which is a "dry" year, respondent estimated between 3.5 and 4 cfs at a point near the mouth of Nicholson Creek. The granting of the instant request would reduce the water available in the stream and result in a proportionate reduction of fish population in Toroda Creek already at levels presently considered only minimally acceptable by the Department of Game. Although the proposed appropriation will not by itself seriously harm the fisheries resource, the cumulative effect of other such appropriations would do so.

V

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The only issue raised in this appeal concerns whether the instant application for appropriation of surface water is likely to prove detrimental to the public interest. RCW 90.03.290. If the appropriation would not be detrimental, then a permit should issue.

1 The evidence shows that further appropriation of any water from
2 Nicholson Creek would result in lowering of the flow of water
3 necessary to adequately support existing food and game fish population
4 in Toroda Creek. It is not disputed that since the 1950's the
5 Department of Game has consistently opposed additional appropriations
6 in an effort to protect the remaining fisheries resource. Further,
7 appropriations would be contrary to the policies set forth in RCW
8 75.20.050. Additionally, the appropriation of water from Nicholson
9 Creek would not further the purpose of preservation of the natural
10 resources and the water resources of the State. RCW 90.54.010. As a
11 general declaration of fundamentals, base flows necessary for the
12 preservation of fish in perennial streams are protected and, where
13 possible, enhanced. RCW 90.54.020(3). The instant application would
14 not protect or enhance, but rather would be detrimental to the
15 preservation of, the existing fish resource contrary to RCW
16 90.03.290. Moreover, as between the competing uses, i.e., irrigation
17 and fish preservation, we cannot say that the proposed irrigation has
18 been shown to maximize benefits to the people of the State, serve an
19 overriding consideration of the public interest or provide the highest
20 feasible development of the use of public waters. RCW 90.54.020(2 and
21 3); RCW 90.03.290.

22 In summary, we conclude that appellant has not shown that the
23 proposed appropriation would not be detrimental to the public
24 interest. Accordingly, the action of the Department of Ecology denying
25 the application should be affirmed.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

II

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The Department of Ecology Order denying Application No. S3-22567 is affirmed.

DATED this 7th day of February, 1980.

POLLUTION CONTROL HEARINGS BOARD

Mal W. Washington
MAT W. WASHINGTON, Chairman

Chris Smith
CHRIS SMITH, Member

David Akana
DAVID AKANA, Member